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No. 80-1471

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1980

COMMONWEALTH OF MASSACHUSETTS,
Appellant

v.

STATE OF NEW HAMPSHIRE, ET AL.,
Appellees

On Appeal From The Supreme Court Of
The State Of New Hampshire

MOTION OF THE STATE OF NEW HAMPSHIRE TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	Page
Table of Authorities.....	ii
Statement of the Case.....	1
Summary of Argument.....	4
Argument.....	7
I. New Hampshire Revised Statutes Annotated 374:35 Does Not Violate The Privileges And Immunities Clause of The United States Constitution.....	7
II. The Congressional Consent To The Regulation of Hydroelectric Power By The State of New Hampshire Is Permitted By The Commerce Clause Of The United States Constitution...	12
Conclusion.....	18

TABLE OF AUTHORITIES

Page

Cases

Austin v. New Hampshire, 420 US 656 (1975)..... 11

Baldwin v. Fish and Game Commission, 436 US 371(1978)..... 9,11

Blake v. McClung, 172 US 239 (1898)..... 9

Coyle v. Smith, 221 US 559 (1911)..... 14,16

National League of Cities v. Usery, 426 US 833 (1976)..... 16

Paul v. Virginia, 75 US 168 (1868)..... 8

Pennsylvania v. New Jersey, 426 US 660 (1976)..... 7

Prudential Insurance Co. v. Benjamin, 328 US 408(1946)..... 13,15

South Carolina v. Katzenbach, 383 US 301 (1966)..... 12,14, 15

Toomer v. Witsell, 334 US 385 (1948)..... 9

United Public Workers v. Mitchell, 330 US 75 (1946)..... 15

United States Constitution

Art. I, § 8 3,13

Art. I, § 9, cl.6 17

Art. IV, § 2 3,7

Amend. 10 ..... passim

16 USC 824(b)..... passim

New Hampshire Statute

RSA 374:35..... passim

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The appellee State of New Hampshire respectfully moves to dismiss the captioned appeal or affirm the judgment of the Supreme Court of the State of New Hampshire on the ground that the questions presented are so unsubstantial as not to warrant further argument.

STATEMENT OF THE CASE

This is an appeal from the decision

of the New Hampshire Supreme Court upholding an order of the New Hampshire Public Utilities Commission. That order required the New England Power Company to sell the power generated at several Connecticut River hydroelectric generating stations, owned by the Company, to consumers in the State of New Hampshire. The generating stations in question are located within the State of New Hampshire.

The New England Power Company has already appealed the decision of the New Hampshire Supreme Court. That appeal is docketed in this Court as No. 80-1208. The Commonwealth of Massachusetts has also appealed the decision of the New Hampshire Supreme Court. In this case, the Commonwealth claims the same errors assigned by the New England Power Company in its appeal. In addition, the Commonwealth challenges the State law authorizing the order of the New Hampshire Public Utilities

Commission, New Hampshire Revised Statutes Annotated 374:35, on the grounds that it violates the privileges and immunities of the citizens of the Commonwealth, in contravention of Article IV, Section 2 of the United States Constitution. The Commonwealth also asserts that Section 201(b) of the Federal Power Act (16 USC 824(b)), if construed to authorize the order of the New Hampshire Public Utilities Commission, is contrary to the commerce clause (Article I, Section 8 of the United States Constitution) and the 10th Amendment to the United States Constitution.

The attention of the Court is invited to the motion of the State of New Hampshire to dismiss or affirm filed in New England Power Co. v. New Hampshire Public Utilities Commission, et al., No. 80-1208. That motion addresses in detail the claims of the Commonwealth of Massachusetts regarding preemption and the prohibitions of the

commerce clause. In this motion, the State of New Hampshire will address only the questions regarding the privileges and immunities clause and the limitations upon the power of the Congress pursuant to the commerce clause.

SUMMARY OF ARGUMENT

New Hampshire RSA 374:35 does not violate the privileges and immunities clause of the United States Constitution. The Commonwealth of Massachusetts enjoys no rights under that clause. It applies only to citizens. The privileges and immunities clause provides only that, when in a State, citizens of another State shall be treated by the host State in a manner equivalent to the treatment afforded by the host State to its own citizens. The statute at issue in this proceeding makes no distinction between citizens of New Hampshire and the citizens of any other

State. Under that statute, any person located in New Hampshire may enjoy the benefits of hydroelectric energy without discrimination.

Many citizens of the Commonwealth of Massachusetts do receive the benefit, in New Hampshire, of New Hampshire's hydroelectric energy. The argument of the Commonwealth would have the State of New Hampshire afford to the citizens of the Commonwealth a benefit not provided to the citizens of New Hampshire, to wit: the delivery of hydroelectric energy to the citizen of the Commonwealth at a point outside the territorial limits of the State of New Hampshire. Rather than affording equality of treatment to the citizens of the Commonwealth, the Commonwealth would have the State of New Hampshire afford those citizens a preference. This the privileges and immunities clause does not require.

The congressional consent to the regulation of hydroelectric power by the State of New Hampshire, which is contained in Section 201(b) of the Federal Power Act (16 USC 824(b)), is permitted by the commerce clause of the United States Constitution. The authority of Congress pursuant to that clause is plenary, limited only by other express provisions of the United States Constitution. Because the Commonwealth may not challenge a federal statute on behalf of its citizens, the only limitation upon the power of Congress pursuant to the commerce clause is the 10th Amendment to the United States Constitution.

The limitation contained in the 10th Amendment is very narrow, and only prohibits the Congress from interfering with the functions of a State which are essential to its separate and independent existence.

The separate and independent existence of a State which does not meet the condi-

tions precedent to a congressional delegation of authority to States generally, is not impaired. The existence and function of the Commonwealth of Massachusetts continues unabated.

ARGUMENT

I. New Hampshire Revised Statutes Annotated 374:35 Does Not Violate The Privileges And Immunities Clause Of The United States Constitution.

At the outset it must be remembered that States enjoy no benefits under Article IV, Section 2 of the United States Constitution. The benefits of that article inure only to citizens. Pennsylvania v. New Jersey, 426 US 660, 665 (1975). Consequently, the arguments of the Commonwealth here can only be made on behalf of its citizens.

Article IV, Section 2 of the United States Constitution provides:

> "the Citizens of each State shall be entitled to all

Privileges and Immunities of
Citizens in the several States."

As the plain wording of that article indicates, the privileges and immunities clause provides only that, when in New Hampshire, citizens of other States shall enjoy the same privileges as the citizens of New Hampshire enjoy. This Court has never held that the State of New Hampshire must afford to citizens of the Commonwealth of Massachusetts, in the Commonwealth of Massachusetts, privileges afforded by the State of New Hampshire to its citizens in New Hampshire. As early as Paul v. Virginia, 75 US 168, 180 (1868), it was made clear that the clause relieves citizens "from the disabilities of alienage in other States...." (Emphasis supplied). That formulation has held true ever since. "The Constitution forbids only such legislation affecting citizens of the respective states as will substantially or practically put a citizen of one state in a condition

of alienage when he is within or when he removes to another state...." (Emphasis supplied) Blake v. McClung, 172 US 239, 256 (1898); the clause was designed "to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." (Emphasis supplied) Toomer v. Witsell, 334 US 385, 395 (1948). Accord, Baldwin v. Fish and Game Commission, 436 US 371, 382 (1978).

RSA 374:35 does not deprive a citizen of the Commonwealth of Massachusetts, located in New Hampshire, the right to purchase, on terms equivalent to those enjoyed by the citizens of New Hampshire, energy generated at the hydroelectric facilities located in the State of New Hampshire. Indeed, many citizens of the Commonwealth do purchase such energy in the State of New Hampshire. Citizens of Massachusetts own and operate

businesses in the State of New Hampshire, and purchase energy for use in those businesses. Citizens of the Commonwealth own second homes, or vacation homes, in the State of New Hampshire, and purchase energy for use in those homes.

The argument of the Commonwealth would have this Court hold that New Hampshire is required to afford to the citizens of the Commonwealth a privilege not afforded by New Hampshire to the citizens of New Hampshire, to wit: the delivery of energy to the citizens of the Commonwealth at a point outside the State of New Hampshire. Just as the citizens of the Commonwealth are not entitled to enjoy in the State of New Hampshire privileges they enjoy in the Commonwealth of Massachusetts, those citizens of the Commonwealth are not entitled to enjoy in the Commonwealth those privileges afforded the citizens of New Hampshire in New Hampshire.

Baldwin v. Fish and Game Commission, above, at 381, n.19.

Lastly, Austin v. New Hampshire, 420 US 656 (1975), does not apply to the instant case. Contrary to the argument of the Commonwealth, New Hampshire has not imposed any tax upon the citizens of Massachusetts. (Jurisdictional statement, p.21). The statute only regulates utilities in the State of New Hampshire selling power generated in the State of New Hampshire to purchasers in the State of New Hampshire. The statute does not address the citizens of the Commonwealth of Massachusetts at all, much less the price at which those citizens may purchase energy in the Commonwealth of Massachusetts. The price at which that energy will be sold to those citizens will be fixed by the Federal Energy Regulatory Commission.

Consequently, the State of New Hampshire has not deprived the citizens

of the Commonwealth of Massachusetts of any privilege or immunity enjoyed by citizens of the State of New Hampshire. The citizens of the Commonwealth are, in New Hampshire, on an equal footing with the citizens of New Hampshire.

II. The Congressional Consent To The Regulation Of Hydroelectric Power By The State Of New Hampshire Is Permitted By The Commerce Clause Of The United States Constitution.

The converse of what was said regarding the standing of the Commonwealth of Massachusetts in Section I of this argument applies in this section. The Commonwealth has no standing to challenge, on behalf of its citizens, any federal statute. South Carolina v. Katzenbach, 383 US 301, 324 (1966). Consequently, the Commonwealth may assert here only those rights which it enjoys as a sovereign.

The authority of Congress under the commerce clause is plenary. It is limited

only by express provisions of the United States Constitution. Prudential Insurance Co. v. Benjamin, 328 US 408, 434 (1946). The only possible limitation upon that authority, benefiting the Commonwealth of Massachusetts, is the 10th Amemdment to that Constitution.

It must be accepted beyond peradventure that the regulation of the sale of electric energy at wholesale is within the regulatory authority of the Congress pursuant to the commerce clause. Article I, Section 8. It is also well settled that, pursuant to that authority, the Congress may delegate to a State the authority to regulate interstate commerce, either alone, or in conjunction with the United States. Prudential Insurance Co. v. Benjamin, above, at 433. When the Congress undertook to enact the Federal Power Act, it did so in order to subject to regulation the interstate sale of electricity at

wholesale. In Section 201(b) of the Federal Power Act the Congress undertook to permit those States which had demonstrated a willingness to regulate hydroelectric energy by providing statutory law to that end to continue to regulate hydroelectric energy. The regulation of hydroelectric energy in the States which had not demonstrated that willingness, would be performed by the United States through the Federal Power Commission. It is permissible for the Congress to address only a part of the problem, or to address a problem by different means in different areas of the country. South Carolina v. Katzenbach, above, at 328. The selection of the five States who had demonstrated a willingness to regulate hydroelectric energy does not impair the equality of States mandated by Coyle v. Smith, 221 US 559 (1911), for the requirement of equality obtains only at the time of admission to

the Union. South Carolina v. Katzenbach, above, at 328-29.

Even if the Congress had preferred the State of New Hampshire over the Commonwealth of Massachusetts in enacting the Federal Power Act, that preference does not violate any right of the Commonwealth of Massachusetts. The Congress, in its regulation of interstate commerce, may prefer intrastate commerce over interstate commerce, may limit interstate commerce, and may prohibit that commerce altogether. Prudential Insurance Co. v. Benjamin, above, at 434. The authority granted to the Congress is necessarily subtracted from the authority previously existing in the Commonwealth of Massachusetts. Because that power no longer exists in the Commonwealth of Massachusetts, it was not reserved to the Commonwealth by the 10th Amendment to the United States Constitution. United Public Workers v. Mitchell,

330 US 75, 96, overruled on other grounds, Adler v. Board of Education, 342 US 485. Accord, Coyle v. Smith, at 567 (each State possesses "that residuum of sovereignty not delegated to the United States by the Constitution itself.")

Thus, in order to conclude that the 10th Amendment prohibits the Congress from preferring one State over another, it is first necessary to conclude that such a preference necessarily deprives States other than the preferred State of attributes which are essential to their separate and independent existence. National League of Cities v. Usery, 426 US 833, 845 (1976). Unlike the regulation of the States, as States, found offensive in Usery, the preference of one State over another in the regulation of interstate commerce detracts not at all from the sovereignty of the other States. They each retain their full authority. Phrased another

way, by permitting one State to regulate interstate commerce within its own borders, where the Congress could have preempted the field entirely, deprives the States who may not regulate commerce within their own borders of nothing that they would not have lost by reason of the total preemption by the Congress. That conclusion is buttressed by the provisions of Article I, Section 9, Clause 6 of the United States Constitution. The framers of the Constitution recognized the possibility of preference in the regulation of commerce by the Congress, and specifically prohibited the preference of the ports of one State over those of another. Had the framers intended to prohibit other preferences, they would have said so. The framers having failed to prohibit preferences, the power of the Congress under the commerce clause is not otherwise limited.

Consequently, Section 201(b) of the Federal Power Act does not unconstitutionally deprive the Commonwealth of Massachusetts of any attribute of its sovereignty.

CONCLUSION

For the reasons stated herein, and in the State's motion in No. 80-1208, either this appeal should be dismissed or the judgment of the Supreme Court of New Hampshire should be affirmed.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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